Big Track Coal Co., Inc. *and* United Mine Workers of America, District 28. Case 11–CA–13415

December 21, 1990

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS CRACRAFT AND DEVANEY

Upon a charge filed by the Union on July 17, 1989, as amended on September 8, 1989, the General Counsel of the National Labor Relations Board issued a complaint December 12, 1989, and an erratum to the complaint December 18, 1989, against Big Track Coal Co., Inc., the Respondent, alleging that it has violated Section 8(a)(1) and (5) of the National Labor Relations Act.

Specifically, the complaint alleges that since on or about March 1, 1989, the Respondent unilaterally, and without notice to or bargaining with the Union, has failed and refused to pay employees on layoff status various accrued benefits including vacation days, personal days, sick days, and floating and graduated vacation days, and to continue health and life insurance coverage for these employees.[1]

On December 29, 1989, the Respondent filed an answer admitting in part and denying in part the allegations of the complaint, and raising various affirmative defenses. Thereafter, on May 7 and 11, 1990, respectively, the Respondent filed an amended answer and a letter amending its amended answer in which the Respondent admitted the factual allegations of the complaint, except for claiming that it paid five named employees 5 days' vacation pay and the laid-off employees 1 month of health benefits. The Respondent, however, did not admit the commission of any unfair labor practices.

On May 29, 1990, the General Counsel filed a Motion for Summary Judgment. On May 31, 1990, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed an opposition to the Motion for Summary Judgment.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Summary Judgment

The General Counsel in his Motion for Summary Judgment notes that the Respondent, through its various answers, has admitted all the factual allegations of the complaint. In view of the admissions the Respondent has made, the General Counsel claims that the complaint allegations stand uncontroverted. The General Counsel emphasizes, citing *Cisco Trucking Co.*, 289 NLRB 1399 (1988), *Benjamin F. Wininger & Son*, 286 NLRB 1177 (1987), and *Bay Area Sealers*, 251 NLRB 89, 90 (1980), that the Board has long held that an employer is required to abide by contractual terms and conditions of employment even where, as here, those terms and conditions are established by a collective-bargaining agreement that has expired, unless the parties have bargained in good faith to impasse over a successor agreement. Because the Respondent in this case has offered no defense to its conduct in failing to provide, as required by the expired collective-bargaining agreement, accrued benefit days and health and life insurance coverage for its laid-off employees, the General Counsel urges the Board to grant the Motion for Summary Judgment and find that the Respondent violated Section 8(a)(1) and (5) of the Act as alleged in the complaint.

In its opposition, the Respondent asserts that it closed the coal mine where the unit employees worked and that the unit employees' last day of employment was March 1, 1989. The Respondent notes that it had 11 employees at the time its equipment was removed from the minesite and it terminated operations. The Respondent claims that it thereafter fulfilled its duty to bargain by consistently offering and remaining willing to bargain over the effects of the decision to close the mine. The Respondent argues that its willingness to bargain in this regard raises issues that are not proper for summary judgment. Although noting ''the fact that little actual bargaining took place,'' the Respondent contends that the parties' failure to reach an agreement is more indicative of an impasse than of a refusal to bargain, violating the Act. The Respondent contends in the alternative that the Union ''may have waived its right to bargain'' by failing to accept the Respondent's offer to meet and bargain over the effects of the decision to close the mine. The Respondent also defends against the complaint allegations on the ground that it does not have sufficient funds to satisfy the laid-off employees' claims for accrued benefits and to continue their health and life insurance coverage. The Respondent further argues that it has paid accrued benefits to some employees and that it provided 1 month of health insurance benefits for the laid-off employees. In addition, the Respondent asserts that the laid-off employees have found other employment and thus are no longer qualified to receive extended benefits. Finally, the Respondent claims that the Board should apply its deferral policy to the Union's charge here, because the matters encompassed by it are subject to the grievance-arbitration procedure of the expired collective-bargaining agreement.

We find no merit to the Respondent's assertions. As the General Counsel points out, it is well established that:

[1] There is a preface to par. 11 of the complaint, but we view the complaint to allege as violations only the specific actions set out in pars. 11(a) and (b).

> An employer has a statutory obligation to continue to follow the terms and conditions of employment governing the employer-employee relationship in an expired contract until it has bargained to impasse with the collective-bargaining representative of its employees, unless the union fails to timely request bargaining following the employer's notice of an intention to modify. [*Cisco Trucking Co*., supra at 1400.]

Thus, although the parties' collective-bargaining agreement expired on January 31, 1988, the Respondent had a continuing obligation, in the absence of impasse, to abide by the terms and conditions of employment set out there. The Respondent in this case has admitted the complaint allegations that since on or about March 1, 1989, it made various unilateral changes. These were changes in its employees' terms and conditions of employment. The Respondent contends, however, that it fulfilled its bargaining obligation by repeatedly offering to bargain over the effects of its decision to close the mine which it claims occurred on March 1, 1989. Yet, the documentary evidence the Respondent has presented on this subject establishes merely that, over 4 months after its admitted refusal to bargain, the Respondent indicated that it was ''willing to bargain over the effects of the shutdown of the mining facility.'' It is clear that an earlier letter the Respondent relies on, dated June 29, 1989, from the Union's attorney to the Respondent's attorney ''concerning deficiencies in the agreed settlement'' also postdated the alleged unfair labor practices and thus does not establish a valid defense to the complaint allegations. Further, the latter document has no probative value here in any event because it fails to reference specifically these parties or the instant dispute. In these circumstances, we conclude that any decision the Respondent may have made to close the mine has no bearing on the substantive issues raised here because the Respondent has failed to demonstrate, as it claims, that the decision was made either before or contemporaneously with the unilateral changes it made on March 1, 1989.[2]

Similarly, we reject the Respondent's impasse defense because the Respondent does not contend that the parties engaged in any effects bargaining until months after the above violations commenced. For this reason, the parties could not have reached a bona fide impasse in this case at the time the Respondent engaged in its unilateral actions. Further, it is clear that the Union could not have waived its bargaining rights here because the Respondent has admitted in its answers that the Union requested bargaining about the general subjects involved in the complaint on which violations are alleged.

Regarding the Respondent's economic defense, we stress that the Board repeatedly has found that an employer's claim that it is financially unable to make required payments does not constitute a valid defense to an allegation that an employer has unlawfully made unilateral changes in employees' terms and conditions of employment.[3] We also find that the Respondent's reliance on the Supreme Court's decision in *NLRB v. Bildisco & Bildisco*, 465 U.S. 513 (1984), is misplaced here because the Respondent has failed to establish that it filed a bankruptcy petition.

Finally, we conclude, contrary to the Respondent, that it is not appropriate to defer the resolution of the issues raised in this case to the parties' arbitral process. In *Collyer Insulated Wire*, 192 NLRB 837, 842 (1971), the Board found that the case was ''eminently well suited to resolution by arbitration'' because ''[t]he contract and its meaning'' were ''at the center of [the] dispute.'' That is not the situation here, where the meaning of the contract does not constitute any part of the instant dispute, and the Respondent does not contend otherwise.[4] Accordingly, we conclude that the Respondent has violated Section 8(a)(1) and (5) of the Act by refusing to bargain with the Union regarding the payment of various accrued benefit days to laid-off employees and the continuation of health and life insurance coverage for these employees.

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a Virginia corporation, has an office and place of business in Clintwood, Virginia, where it is engaged in the operation of a coal mine. During the 12-month period preceding the issuance of the complaint, which is a representative period, the Respondent, in the course and conduct of its business operations, sold and shipped from its Clintwood, Virginia facility coal valued in excess of $50,000 directly to Clinchfield Coal Company, a Virginia corporation with an office and place of business in Lebanon, Virginia, where it is engaged in the mining, transportation, and sale of coal. During the 12-month period preceding the issuance of the complaint, which is a representative period, Clinchfield Coal Company, in the course and conduct of its business operations, sold and shipped from its Lebanon, Virginia facility products, goods, and materials valued in excess of $50,000 directly to points located outside the Commonwealth of Virginia. We find that Clinchfield Coal Company is an employer

[2] The Respondent asserts that the Union ''argues that [the Respondent] violated Section 8(a)(5) by refusing to bargain over the effects of the closure and by failing to pay its laid off employees various benefits and to continue health and life insurance coverage.'' Contrary to the Respondent, the complaint does not allege an effects bargaining violation and we do not pass on that issue here.

[3] See generally *Allis-Chalmers Corp*., 286 NLRB 219, 222–223 (1987).

[4] See *American Commercial Lines*, 296 NLRB 622, 623 (1989).

engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. We further find that the Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

Since on or about January 7, 1985, the Respondent has recognized the Union as the exclusive collective-bargaining representative of employees in the following appropriate unit:

> All employees employed in the mining of coal at the Respondent's Clintwood, Virginia, coal mine, excluding office clerical employees, guards and supervisors as defined in the Act.

The Respondent and the Union have been parties to a collective-bargaining agreement, which was effective by its terms from October 1, 1984, until January 31, 1988.

Commencing about February 23, 1989, and continuing to date, the Union has requested the Respondent to bargain collectively with respect to rate of pay, wages, and hours of employment as the exclusive representative of the unit employees. Since about March 1, 1989, the Respondent unilaterally and without notice to or bargaining with the Union has failed and refused to pay its laid-off employees accrued benefits, including vacation days, personal days, sick days, and floating and graduated vacation days, and to continue health and life insurance coverage for these employees.

We find that by the acts and conduct described above the Respondent has failed and refused to bargain collectively in good faith with the Union. The Respondent thereby has engaged in unfair labor practices within the meaning of Section 8(a)(1) and (5) of the Act.

CONCLUSION OF LAW

By its unlawful unilateral changes in failing and refusing to pay its laid-off employees accrued benefits including vacation days, personal days, sick days, and floating and graduated vacation days, and to continue health and life insurance coverage for these employees, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (5) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative actions designed to effectuate the policies of the Act. We shall order the Respondent to pay its laid-off employees accrued benefits, including vacation days, personal days, sick days, and floating and graduated vacation days, and to continue health and life insurance coverage for these employees and make them whole for any expenses they may have incurred as the result of the Respondent's failure to make these insurance payments in the manner prescribed in *Kraft Plumbing & Heating*, 252 NLRB 891 (1980), enfd. mem. 661 F.2d 940 (9th Cir. 1981), with interest as provided for in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).[5] In view of the Respondent's apparent cessation of operations at the mine where the unit employees worked, we shall require, in addition to the usual notice posting, that the Respondent mail copies of the notice to all unit employees.

ORDER

The National Labor Relations Board orders that the Respondent, Big Track Coal Co., Inc., Clintwood, Virginia, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) By unilaterally failing and refusing to pay employees on layoff status various accrued benefits, including vacation days, personal days, sick days, and floating and graduated vacation days, and to continue health and life insurance coverage for these employees in the following appropriate unit:

> All employees employed in the mining of coal at the Respondent's Clintwood, Virginia, coal mine, excluding office clerical employees, guards and supervisors as defined in the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain collectively with the Union as the exclusive representative of the unit employees with respect to the payment to laid-off employees of accrued benefits, including vacation days, personal days, sick days, and floating and graduated vacation

[5] Contrary to our dissenting colleague, we do not agree that the Respondent created a genuine issue for hearing by its assertion, in its opposition to the General Counsel's Motion for Summary Judgment, that its coal mine ceased operations on February 23, 1989, and that the last working day for employees was March 1, 1989. As explained above, the Respondent has admitted complaint allegations that since on or about March 1, 1989, it had unilaterally, and without notice to the Union, failed to pay laid-off employees various *accrued* benefits. This states a violation of the Act regardless whether the Respondent actually did terminate all operations and employees as of March 1 and regardless what it did or did not do with respect to bargaining concerning the ''effects'' of the closure. Discontinuance of already accrued benefits cannot properly be deemed an effect of the closure. The Respondent's assertions concerning a cessation of operations may, if proven, have an effect on the make-whole remedy for the employees, however. We shall leave that issue to the compliance stage of the proceeding.

We also leave to compliance the Respondent's claims that it has paid five named employees 5 days' vacation pay and all the laid-off employees 1 month of health benefits, and that the laid-off employees are no longer entitled to receive health and life insurance benefits because they have found other employment providing for them.

days, and the continuation of health and life insurance coverage for these employees.

(b) Pay its laid-off employees accrued vacation benefits, including vacation days, personal days, sick days, and floating and graduated vacation days in the manner set forth in the remedy section of this decision.

(c) Restore health and life insurance coverage for its laid-off employees and make these employees whole for any losses they may have incurred as the result of the Respondent's failure and refusal to make these insurance payments on their behalf.

(d) Post at its facility in Clintwood, Virginia, copies of the attached notice marked ''Appendix.''[6] Copies of the notice, on forms provided by the Regional Director for Region 11, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Mail a copy of the notice to all employees employed by the Respondent in the appropriate unit. Such notice shall be mailed to the last known address of each employee.

(f) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

MEMBER CRACRAFT, dissenting.

Contrary to my colleagues, I would deny the General Counsel's Motion for Summary Judgment because the Respondent's opposition to the motion indicates on its face that a genuine issue for hearing ''may'' exist. See Rules and Regulations, Section 102.24(b) (revised effective Oct. 16, 1989).

The complaint alleges that since on or about March 1, 1989, the Respondent has violated Section 8(a)(5) and (1) of the Act by (a) unilaterally and without notice to or bargaining with the Union failing and refusing to pay its laid-off employees various accrued benefits established in the collective-bargaining agreement that had expired on January 31, 1988, and (b) by also unilaterally and without notice to or bargaining with the Union failing and refusing to continue health and life insurance coverage, also established in the expired collective-bargaining agreement, for its laid-off employees.

In its answer to the complaint, the Respondent admits, with certain qualifications, that it engaged in the above conduct, but denies, without elaboration, that it violated the Act by doing so. In its opposition to the motion, the Respondent asserts that it has closed the instant coal mine and that ''the last working day for the coal mine was February 23, 1989, and the last day of work for the employees was March 1, 1989.''

If the Respondent closed its business on or about March 1, 1989, as it indicates in its opposition that it did, then its unilateral discontinuance of the above benefits and coverages might not have been in violation of the Act.[1] Thus, the complaint alleges in pertinent part that ''Since on or about March 1, 1989, Respondent . . . failed and refused to pay its laid off employees various accrued benefits . . . and at all times thereafter . . . failed to and refused to continue health and life insurance coverage for its laid off employees.'' To the extent that the complaint may be alleging that various benefits have continued to accrue since on or about March 1, 1989, then the question of whether the Respondent was no longer in business after that date is material to a resolution of any such allegation. But even beyond that, the complaint clearly alleges a failure by the Respondent at all times since March 1, 1989, to continue health and insurance coverage for ''laid off'' employees. Again, the question of whether the Respondent was no longer a business after that date is material to a resolution of that allegation. Accordingly, the factual questions of whether and when the Respondent closed its business are material to the resolution of the complaint allegations and present genuine issues for hearing. Under these circumstances, I would not grant the Motion for Summary Judgment.

[1] There is no allegation that the Respondent failed to engage in bargaining about the effects of any such closure.

[6] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT unilaterally fail and refuse to pay employees on layoff status accrued benefits, including vacation days, personal days, sick days, and floating and graduated vacation days, and to continue health and life insurance coverage for laid-off employees in the following appropriate unit:

> All employees employed in the mining of coal at the Respondent's Clintwood, Virginia, coal mine, excluding office clerical employees, guards and supervisors as defined in the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, on request, bargain collectively with United Mine Workers of America, District 28 as the exclusive representative of the unit employees with respect to the payment to laid-off employees of accrued benefits, including vacation days, personal days, sick days, and floating and graduated vacation days, and the continuation of health and life insurance coverage for these employees.

WE WILL pay our laid-off employees accrued benefits, including vacation days, personal days, sick days, and floating and graduated vacation days, with interest.

WE WILL restore health and life insurance coverage for our laid-off employees and make these employees whole for any losses they may have incurred as the result of our failure and refusal to make these insurance payments on their behalf, with interest.

BIG TRACK COAL CO., INC.